

No. 15-1869

**In the United States Court Of Appeals
for the Sixth Circuit**

Peter Bormuth,

Plaintiff-Appellant,

v.

County of Jackson,

Defendant-Appellee.

On Appeal from United States District Court,
Eastern District of Michigan, Judge Marianne O. Battani

**Brief of *Amicus Curiae* Americans United for Separation of
Church and State In Support of Appellant and Reversal**

Richard B. Katskee (katskee@au.org)
Gregory M. Lipper (lipper@au.org)
AMERICANS UNITED FOR SEPARATION
OF CHURCH AND STATE
1901 L Street, NW, Suite 400
Washington, DC 20036
(202) 466-3234

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit

Case Number: 15-1869

Case Name: Peter Bormuth v. County of Jackson

Name of counsel: Gregory M. Lipper

Pursuant to 6th Cir. R. 26.1, Americans United for Separation of Church and State
Name of Party

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1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

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Identity and Interest of *Amicus Curiae*

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization.¹ Its mission is twofold: (1) to advance the free-exercise rights of individuals and religious communities to worship as they see fit, and (2) to preserve the separation of church and state as a vital component of democratic government. Founded in 1947, Americans United has more than 120,000 members and supporters across the country.

Americans United has participated as counsel or *amicus curiae* in legislative-prayer cases across the country, including representing Respondents in *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014). Consistent with Supreme Court precedent, Americans United seeks to ensure that governmental bodies that open their meetings with prayers do not exploit the opportunity to advance a particular religion,

¹ Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amicus* states the following: no party's counsel authored this brief in whole or in part; and no party, party's counsel, or person other than *amicus*, its members, or its counsel contributed money intended to fund the preparation or submission of this brief. A motion for leave to file accompanies this brief.

discriminate against religious minorities, or coerce citizens to participate in unwanted prayers.

Introduction

Month after month, the Jackson County Board of Commissioners opens its public meetings with an invocation delivered by one of the nine Commissioners. The Chair asks the citizens who attend the meeting to rise, “assume a reverent position,” and bow their heads in prayer. The Commissioners—all of whom are Christian—deliver Christian prayers, often in the name of Jesus Christ, and do not allow members of other faiths to lead the prayer. Citizens who attend the meetings in order to petition the County Commissioners—just minutes after the prayer takes place—have little choice but to participate, even if doing so violates their conscience. Otherwise, the Commissioners will view them as unwelcome religious dissenters.

When Plaintiff Peter Bormuth rose during the public-comment period at a Jackson County meeting and asked the Commission to alter its prayer practice, at least one Commissioner turned his back on Mr. Bormuth. After Mr. Bormuth filed this case, one of the Commissioners publicly referred to him as a “nitwit.” Another warned against allowing

invited guests to give invocations for fear that they would express non-Christian religious beliefs. Still another described the lawsuit as “an attack on Christianity, and ... an attack on our Lord and Savior Jesus Christ.”

Under the Establishment Clause, legislative bodies that choose to have invocations may not “exploit[]” “the prayer opportunity ... to proselytize or advance any one, or to disparage any other, faith or belief.” *Marsh v. Chambers*, 463 U.S. 783, 794–95 (1983). The Jackson County Board of Commissioners has done both.

Background

Since at least 2011, the Jackson County Board of Commissioners has included prayer as part of its official meetings. *See* R. 10, App’x B to Am. Comp., PageID# 88 (Policy Manual, Board Rules, Article VI § 4.2, specifying Board Agenda). On a rotating basis, the County Commissioners deliver prayers that they themselves compose. *See* R. 50, Report and Recommendation (“Report”), PageID# 876–81; *see also* R. 61, Dist. Ct. Opinion, PageID# 1052 (adopting Report’s factual findings).

These commissioner-led prayers often feature Christian references, including requests that God “make us one people united and praising you through Christ our Lord,” R. 25-2, Ex. A to Def.’s Mot. for Summ. J., PageID# 270; declarations that “[i]n this we pray in Jesus’ name,” *id.* PageID# 273; and invocations that, “Almighty God, we turn to you as believers, as Christians,” *id.* PageID# 274. Before praying, the Commissioners direct the citizens attending the meetings to “Please bow your heads,” “all rise,” and “assume a reverent position.” R. 29-1, Bormuth Affidavit ¶¶ 7–25, PageID# 370–72; *see also* R. 10, Am. Comp. ¶¶ 20, 21, PageID# 65.

In August 2013, Jackson County resident Peter Bormuth attended a Commission meeting. During the public-comment period, he expressed concerns about the Commission’s delivery of Christian prayers. R. 10, Am. Comp. ¶¶ 28–31, PageID# 68–69. In response, Commissioner Lutchka made faces of disgust and turned his chair so that his back faced Mr. Bormuth. *Id.* ¶ 31, PageID# 69.

Later that month, Mr. Bormuth filed this *pro se* lawsuit, asserting that the County’s prayer practice violates the Establishment Clause by coercing religious exercise and advancing Christianity at the expense of

other belief systems. *Id.* ¶ 37, Page ID# 70–71. The County Commissioners responded with even more derision. At a public meeting of the Personnel & Finance Committee, the Commissioners considered a prayer policy in response to the lawsuit. Commissioner Lutchka called the discussion a “waste of time,” and another commissioner stated that the issue was simply “political correctness nonsense” raised by a “nitwit.” County of Jackson, *Personnel & Finance Committee November 12, 2013 Jackson County, MI*, YouTube (Dec. 19, 2013), <http://tinyurl.com/2013nov12> (38:56, 43:11–43:32).

The Commissioners—all of whom are Christian—declined to allow its prayers to be delivered by private citizens, because “if someone from the public wants to come before us and say they are an ordained minister, we will have to allow them.” County of Jackson, *Personnel & Finance Committee November 12, 2013 Jackson County, MI*, YouTube (Dec. 19, 2013), <http://tinyurl.com/2013nov12> (37:54). A Commissioner warned, “I think we are opening Pandora’s box here because you are going to get members of the public who are going to come up at public comment and we are going to create a lot of problems when certain people come up here and say things they are not going to like.” *Id.*

The magistrate judge recommended granting summary judgment to Mr. Bormuth. R. 50, Report, PageID# 877. Among other things, the magistrate judge noted that the prayers were composed and delivered by the County Commissioners themselves, rather than by guest chaplains; as a result, the Commissioners acted as “supervisors and censors of religious speech.” *Id.* PageID# 912–13 (citing *Town of Greece*, 134 S. Ct. at 1822). In addition, the Commissioners specifically directed citizen-attendees to participate in the prayers, thus producing unconstitutional coercion. *Id.* PageID# 911–12.

The district court declined to adopt the magistrate judge’s recommendations, and instead granted summary judgment to the County. R. 61, Dist. Ct. Opinion, PageID# 1067. The district court thought it “immaterial” that all the Commissioners—that is, all the prayergivers—are Christian, *id.* PageID# 1057; found the pervasive Christian references to be “benign,” *id.*; and believed that “the risk of prejudice is no greater if the request [or prayer] is delivered by a Commissioner than if it is delivered by a guest chaplain,” *id.* PageID# 1065.

Summary of Argument

In *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014), the Supreme Court concluded that local legislative bodies may invite outside speakers to deliver prayers before their legislative meetings, *see id.* at 1815, but the Court did not write local governments a blank check to impose religion on their citizens. Prayers, the Court made clear, must not “afford government an opportunity to proselytize or force truant constituents into the pews.” *Id.* at 1825. Rather, the First Amendment prohibits local governments from discriminating against religious minorities, coercing citizens to participate in unwanted religious exercise, or exploiting the prayer practice to advance a particular faith. *See id.* at 1824–25. Jackson County’s practices, however, do all of these things. The County thus goes beyond what the Supreme Court allowed in *Town of Greece*, and its practices violate the Establishment Clause.

Indeed, the two other federal courts to address similar prayer practices after *Town of Greece* have concluded that they are unconstitutional. *See Hudson v. Pittsylvania County*, __ F.3d __, 2015 WL 3447776, at *10 (W.D. Va. May 28, 2015); *Lund v. Rowan County*, __ F. Supp. 3d __, 2015 WL 2072345, at *10 (M.D.N.C. May 4, 2015)

appeal docketed, No. 15-1591 (4th Cir. June 3, 2015). As the court held in *Lund*, the exclusion of non-Christians from the opportunity to deliver prayers, using the means employed by the Commission here, “inherently discriminates and disfavors religious minorities” and fails to recognize and respect the citizenry’s religious diversity. 2015 WL 2072345, at *10. And as the court concluded in *Hudson*, instructing citizens to participate in commissioner-led prayers—and disparaging those who refuse to go along—“create[s] a coercive atmosphere.” 2015 WL 3447776, at *10.

The Commissioners have stated that they view Mr. Bormuth’s request for a nondiscriminatory prayer practice as “an attack on Christianity and Jesus Christ. Period.” County of Jackson, *Personnel & Finance Committee November 12, 2013 Jackson County, MI*, YouTube (Dec. 19, 2013), <http://tinyurl.com/2013nov12> (32:54). But it is not the Commissioners’ job to promote or defend a particular religion, Christianity or otherwise. Legislative prayers are constitutional to the extent that legislators wish to seek spiritual guidance for themselves or to solemnize the legislative sessions. *Town of Greece*, 134 S. Ct. at 1825–26. The Jackson County Commissioners, however, treat the

prayers as a chance to push Christianity on County residents. In short, “the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief.” *Marsh v. Chambers*, 463 U.S. 783, 794–95 (1983). The Establishment Clause allows no such thing.

Argument

I. The County’s Prayer Practice Impermissibly Advances Christianity.

The County Commissioners have exploited the prayer opportunity, intended to provide spiritual guidance to government officials, in order to press Christianity on citizens who attend government meetings. In so doing, the Commissioners have exceeded the limitations on legislative prayer set forth in *Marsh v. Chambers* and *Town of Greece v. Galloway*, in violation of the Establishment Clause.

Marsh and *Town of Greece* involved prayers delivered for the benefit of legislators. *Town of Greece*, 134 S. Ct. at 1825. In *Marsh*, the Nebraska state legislature appointed a chaplain to deliver the prayers, “because his performance and personal qualities were acceptable to the body appointing him”; it did not have or act upon any “impermissible motive” such as favoritism toward the chaplain’s faith, discrimination

against any other faith, or a desire to coerce religious belief or devotional exercise. 463 U.S. at 793–94. In *Town of Greece*, the town board invited guest chaplains to deliver prayers for the officials’ benefit, opening the opportunity to citizens of all faiths and even to atheists. *See* 134 S. Ct. at 1816, 1826. The prayer practices in those cases were permissible because government officials did not determine the content of the prayers, evince a discriminatory purpose, or attempt to impose the prayers on the citizens in attendance. *See id.* at 1825–26; *Marsh*, 463 U.S. at 794–95.

In Jackson County, the Board of Commissioners flouts each of those limitations on legislative prayer. The prayers are intended for and directed at the audience, not the Commissioners themselves; when no citizens attend the meetings, no prayers are delivered. *See November 6, 2014 Special Jackson County Board of Commissioners Meeting Video*, YouTube (Nov. 7, 2014), <http://tinyurl.com/2014nov6> (0:01–0:47). The Commissioners ensure that the prayers are Christian: they are delivered not by appointed or invited chaplains but by the Commissioners themselves, who are all Christian, who regularly deliver explicitly Christian prayers, and who do not offer prayers in any other

faith tradition. And unlike in *Marsh* and *Town of Greece*, in which there was no evidence of an improper sectarian motive in the selection of chaplains, the Jackson County Commissioners have admitted that they refuse to invite outside speakers because they wish to exclude non-Christian prayers. County of Jackson, *Personnel & Finance Committee November 12, 2013 Jackson County, MI*, YouTube (Dec. 19, 2013), <http://tinyurl.com/2013nov12> (28:23, 37:54). Indeed, the Commissioners have stated that they viewed Mr. Bormuth's objections to the prayer practices, and his eventual court challenge, as assaults on Christianity itself, and they have portrayed themselves as defenders of Christianity. County of Jackson, *Personnel & Finance Committee November 12, 2013 Jackson County, MI*, YouTube (Dec. 19, 2013), <http://tinyurl.com/2013nov12> (32:54, 33:25).

First, unlike in *Marsh* or *Town of Greece*, the County's prayers are designed to direct Christianity at citizens rather than to provide spiritual guidance to the Commissioners themselves. The Commissioners typically deliver the prayers from their places, facing the attending public. *See, e.g.*, County of Jackson, *August 18, 2015 Jackson County Board of Commissioners Meeting*, YouTube (Sept. 1,

2015), <http://tinyurl.com/2015aug18> (00:30–00:53); County of Jackson, *March 17, 2015 Jackson County Board of Commissioners Meeting*, YouTube (Mar. 18, 2015), <http://tinyurl.com/2015mar17c> (00:08–00:40). They call for the audience to participate in the religious exercises, instructing audience members to “rise,” “bow your heads,” or “assume a reverent position.” R. 29-1, Bormuth Affidavit ¶¶ 7–25, PageID# 370–72; *see also, e.g.*, R. 10, Am. Comp. ¶¶ 20, 21, PageID# 65. The *only* meeting of the full Board of Commissioners during the past two years when no prayer was offered was the meeting that no members of the public attended. County of Jackson, *November 6, 2014 Special Jackson County Board of Commissioners Meeting Video*, YouTube (Nov. 7, 2014), <http://tinyurl.com/2014nov6> (0:01–0:47). And when Mr. Bormuth objected to the prayers, Commissioners accused him of trying to deprive Jackson County’s *residents*—not the Commissioners—of their rights. *See* County of Jackson, *Personnel & Finance Committee November 12, 2013 Jackson County, MI*, YouTube (Dec. 19, 2013), <http://tinyurl.com/2013nov12> (43:35–43:42). In short, the Commissioners treat the prayers not as an opportunity to seek spiritual guidance for their own work, but

as an opportunity to direct religious messages at Jackson County's citizens.

As the Supreme Court has held, prayer before legislative meetings is supposed to "accommodate the spiritual needs of lawmakers"; the "principal audience" for government invocations is supposed to be the "lawmakers themselves." *Town of Greece*, 134 S. Ct. at 1825. The prayers are "not to afford government an opportunity to proselytize or force truant constituents into the pews." *Id.* The County here does the opposite: when members of the public are present, it preaches to them and directs them to participate; when only the Commissioners are present, they omit the prayer entirely.

Second, because the Commissioners seek to promote Christianity to the audience, they insist on controlling the content of the prayers and prevent members of minority faiths from serving as prayergivers. When considering whether to allow outside guests to present prayers, as in *Town of Greece*, a Commissioner expressed concern that "if someone from the public wants to come before us and say they are an ordained minister, we will have to allow them." County of Jackson, *Personnel & Finance Committee November 12, 2013 Jackson County, MI*, YouTube

(Dec. 19, 2013), <http://tinyurl.com/2013nov12> (37:54). One Commissioner expressed concern over losing control of the prayers' content, warning: "I think we are opening Pandora's box here because you are going to get members of the public who are going to come up at public comment and we are going to create a lot of problems here when certain people come up here and say things they are not going to like." *Id.* Another Commissioner asked rhetorically whether, if the County invited other speakers, the Commissioners would have to tell invited guests "that they can only pray to Allah or, you know, a Buddhist god." *Id.* (28:23). These statements confirm that the County's policy limiting the invocation opportunity to government officials—all of whom are Christian—is intended to prevent participation by religious minorities.

When selecting speakers to solemnize legislative meetings, the government must "maintain[] ... a policy of nondiscrimination." *Town of Greece*, 134 S. Ct. at 1824. Thus, in *Town of Greece* the Court relied in part on the town's assurance "that a minister or layperson of any persuasion, including an atheist, could give the invocation." *Id.* at 1816; *see also id.* at 1817 ("A Wiccan priestess who had read press reports about the prayer controversy requested, and was granted, an

opportunity to give the invocation.”); *id.* at 1829 (Alito, J., concurring) (“when complaints were received, the town made it clear that it would permit any interested residents, including nonbelievers”); *cf. id.* at 1831 (“I would view this case very differently” if Greece had intentionally omitted synagogues from the invitation list). But rather than adopt a neutral policy allowing a diversity of voices, the Jackson County Commissioners have gone out of their way to ensure that exclusively Christian speakers deliver predominantly Christian prayers and that minority faiths stay unrepresented.

Moreover, unlike in *Town of Greece*, the Commissioners here act as “supervisors and censors” of religious speech. 134 S. Ct. at 1822. It is the Commissioners—not private citizens invited as guests—who declare that the prayers are delivered “in Jesus’s name.” *See, e.g., R. 25-2, Ex. A to Def.’s Mot. for Summ. J., PageID# 266–74* (text of prayers delivered at Jackson County Commission meetings from 2011 to 2013). As one Commissioner acknowledged, “[e]very board member here who gets up there and says a prayer during invocation, we end our invocation in the name of Jesus Christ.” County of Jackson, *Personnel & Finance Committee November 12, 2013 Jackson County, MI*, YouTube (Dec. 19,

2013), <http://tinyurl.com/2013nov12> (33:14). The Commissioners have proclaimed in their prayers that “we will be celebrating the birth of your son Jesus Christ.” R. 25-2, Ex. A to Def.’s Mot. for Summ. J., PageID# 269 (Dec. 13, 2011 meeting). They have “ask[ed] that the Holy Spirit will guide what we say and the decisions that we make.” *Id.* PageID# 267 (Feb. 15, 2011 meeting). They have urged “each and every one of us [to] realize that we serve [God] first.” *Id.* PageID# 270 (Feb. 21, 2012 meeting). And they have prayed to “make us one people united and praising you through Christ our Lord.” *Id.* (April 17, 2012 meeting).

Although on rare occasions the Commissioners have invited outside guests to deliver the prayers, these guests have typically been other County officials or the Commissioners’ pastors. *See e.g.*, County of Jackson, *Agenda of March 18, 2014 Jackson County Board of Commissioners Meeting*, <http://tinyurl.com/March18Minutes>; County of Jackson, *Agenda of April 20, 2014 Jackson County Board of Commissioners Meeting*, <http://tinyurl.com/April20Minutes>; County of Jackson, *Agenda of September 18, 2001 Jackson County Board of Commissioners Meeting*, <http://tinyurl.com/Sept18Minutes>. The County has not explained why, when, or how these speakers are chosen, and

has certainly not opened the prayer opportunity to clergy or members of the general public on terms that are equal and nondiscriminatory.

The coercive and discriminatory nature of the County's prayer practices are highlighted by the Commissioners' responses to Mr. Bormuth's objections. One Commissioner viewed Mr. Bormuth's case not as a legal objection to a governmental policy but as "an attack on Christianity, and ... an attack on our Lord and Savior Jesus Christ." County of Jackson, *Personnel & Finance Committee November 12, 2013 Jackson County, MI*, YouTube (Dec. 19, 2013), <http://tinyurl.com/2013nov12> (33:25). According to this Commissioner, a challenge to the County's prayer practice is "an attack on Christianity and Jesus Christ. Period." *Id.* (32:54).

In nonetheless upholding the County's prayer practices, the district court reasoned that (1) under *Town of Greece*, the County was not required to ensure representation by other religions, R. 61, Dist. Ct. Opinion, PageID# 1057, and (2) the County's prayers do "not foster an entanglement with religion" because the state legislature's practice, in *Marsh*, of hiring and paying an official chaplain "may be regarded as a greater governmental entanglement with religion than the

Commissioners’ rather benign religious references,” R. 61, Dist. Ct. Opinion, PageID# 1065–66. But as detailed above, *Marsh* and *Town of Greece* involved prayers designed to provide spiritual guidance to government officials, not to promote a particular religion to the private citizens in the audience. In *Marsh*, the state appointed a chaplain who delivered nonsectarian prayers for the benefit of the legislators themselves; in *Town of Greece*, the town board invited guest chaplains on a nondiscriminatory basis, did not dictate the content of their prayers, and extended the invitations for the benefit of the town board itself. Here, by contrast, the Commissioners seek to impose Christianity on the audience by composing and delivering Christian prayers themselves, directing those prayers at the citizens attending the meetings, call for the citizens to participate, and go out of their way to ensure that non-Christians are excluded.

As the recent *Lund* and *Hudson* decisions explain, practices like these impermissibly exploit the prayer opportunity to advance Christianity, and thus violate the rules established by *Marsh* and *Town of Greece*. In *Lund*, the court enjoined the delivery of Christian prayers by county commissioners where, as here, no invocation had “referenced

a deity specific to a faith other than Christianity,” and the commissioners’ practices and statements “demonstrate[d] that the prayers were for the benefit of the public.” 2015 WL 2072345, at *1, 14, 15. Given these circumstances, the court concluded, there was “a much greater and more intimate government involvement in the prayer practice than that at issue in *Town of Greece* or *Marsh*.” *Id.* at *10.

Similarly, in *Hudson*, the court enjoined a prayer practice in which the legislators composed and led the prayers and directed them at members of the audience, “rendering the prayer practice far less of ‘an internal act’ directed at the Board than was the case in both *Marsh* and *Town of Greece*.” *Hudson*, 2015 WL 3447776, at *12. As here, it was significant that “the Board consistently engage[d] in prayer associated with one faith tradition” and that minority religions were “shut out.” *Id.*

Whatever else the First Amendment may require or forbid, the “government is prohibited from prescribing prayers to be recited in our public institutions in order to promote a preferred system of belief or code of moral behavior.” *Town of Greece*, 134 S. Ct. at 1822 (citations omitted). Under no circumstance may “one religious denomination” be “officially preferred over another.” *Larson v. Valente*, 456 U.S. 228, 244

(1982). Because Jackson County does exactly that, its current prayer practice cannot stand.

II. The County Coerces Religious Participation.

In their zeal to impose Christianity on Jackson County residents, the County Commissioners commit an independent but related Establishment Clause violation: they coerce citizens to participate in the County’s official Christian prayers. It is “an elemental First Amendment principle that government may not coerce its citizens to support or participate in any religion or its exercise.” *Town of Greece*, 134 S. Ct. at 1825 (controlling plurality). In concluding that the Town of Greece’s prayer policy did not result in impermissible coercion, the Supreme Court explained that “[t]he inquiry remains a fact-sensitive one that considers both the setting in which the prayer arises and the audience to whom it is directed.” *Id.* When those factors are considered here, the coercion is plain.

The Commissioners specifically instruct citizens to participate in the prayers, and they publicly disparaged Mr. Bormuth after he objected to them—signaling to other citizens that expressing dissenting views or failing to embrace the County’s prayers has a high price.

Citizens attend County Commission meetings to petition their government and obtain assistance or relief from the Commissioners. These citizens will reasonably fear that refusing to participate in the prayers—delivered by the very officials who will hear and decide their plea—will jeopardize their chances of obtaining a favorable decision. With the stakes this high, citizens will have little choice but to participate in the Commissioners’ prayers.

First, an instruction to participate in a prayer is especially coercive when it comes from a government official who leads the meeting. In Jackson County, that is exactly what happens: immediately after calling the meeting to order, the Commission’s chair often instructs the citizens in attendance to stand, bow their heads, “assume a reverent position,” or join in the prayer; and the Commissioner who delivers the prayer frequently reiterates those instructions or adds others to similar effect. *See, e.g.*, R. 25-2, Ex. A to Def.’s Mot. for Summ. J., PageID# 267 (Jan. 3, 2011 meeting) (“Bow your heads and we will give the Lord a little praise.”); County of Jackson, *April 15, 2014 Jackson County Board of Commissioners Meeting*, YouTube (Apr. 16, 2014), <http://tinyurl.com/2014apr15> (0:12) (“Assume a reverent position,

please.”); County of Jackson, *February 18, 2014 Jackson County Board of Commissioners Meeting*, YouTube (Feb. 19, 2014), <http://tinyurl.com/2014feb18> (0:17) (“Everyone please stand and please bow your heads. Let us pray.”); County of Jackson, *June 18, 2013 Jackson County Board of Commissioners Meeting*, YouTube (Jun. 19, 2013), <http://tinyurl.com/2013jun18> (0:12) (Chairman: “All rise.” Commissioner delivering invocation: “Please bow your head in prayer.”).² As in *Lund*, the

² See also County of Jackson, *May 21, 2013 Jackson County Board of Commissioners Meeting*, YouTube (Jun. 6, 2013), <http://tinyurl.com/2013may21> (0:11) (Chairman: “All rise.” Commissioner delivering invocation: “If you will bow your heads with me for a word of prayer.”); County of Jackson, *June 16, 2015 Jackson County Board of Commissioners Meeting*, YouTube (Jun. 17, 2015), <http://tinyurl.com/2015Jun16> (0:39) (“Please bow your heads.”); County of Jackson, *April 21, 2015 Jackson County Board of Commissioners Meeting*, YouTube (Apr. 23, 2015), <http://tinyurl.com/2015apr21> (0:12) (“All bow our heads.”); County of Jackson, *July 23, 2013 Jackson County Board of Commissioners Meeting*, YouTube (Jul. 24, 2013), <http://tinyurl.com/2015jul23> (0:15) (“Bow your heads with me, please.”); County of Jackson, *October 15, 2013 Jackson County Board of Commissioners Meeting*, YouTube (Oct. 16, 2013), <http://tinyurl.com/2013oct15> (0:11) (Chairman: “All rise”); County of Jackson, *January 2, 2015 Jackson County Board of Commissioners Organizational Meeting*, YouTube (Jan. 2, 2015), <http://tinyurl.com/2015jan2> (0:07) (Presiding officer: “Please stand.”); County of Jackson, *April 16, 2013 Jackson County Board of Commissioners Meeting*, YouTube (Apr. 17, 2013), <http://tinyurl.com/2013apr16> (0:11) (Chairman: “All rise and assume a reverent position.”); County of Jackson, *December 17, 2013 Jackson County*

County's practices here "fall squarely within the realm of soliciting, asking, requesting, or directing, and thus within the territory of concern to the *Town of Greece* plurality." 2015 WL 2072345, at *14.

These directions from County Commissioners put significant pressure on attendees, many of whom will petition the Commissioners within minutes of the prayer. Among other reasons, County residents have attended Commission meetings to ask for necessary repairs to roads leading to their homes or businesses, County of Jackson, *July 23, 2013 Jackson County Board of Commissioners Meeting*, YouTube (Jul. 24, 2013), <http://tinyurl.com/2015jul23> (24:58–30:19); to redress illegal discrimination, County of Jackson, *March 17, 2015 Jackson County Board of Commissioners Meeting*, YouTube (Mar. 18, 2015), <http://tinyurl.com/2015mar17c> (5:27–7:42); or to request funding for disabled students' transportation to school, County of Jackson, *June 18, 2013 Jackson County Board of Commissioners Meeting*, YouTube (Jun. 19, 2013), <http://tinyurl.com/2013jun19> (35:53–38:30). For "concerned citizens wishing to advocate for matters of local import with direct

Board of Commissioners Meeting, YouTube (Dec. 19, 2013), <http://tinyurl.com/2013dec17> (13:21) (Chairman: "All rise.").

impact on local citizens' lives, attendance and maintaining the Board's respect are of utmost importance." *Lund*, 2015 WL 2072345, at *19.

In short, County Commissioners have direct authority over important matters affecting attendees' lives. *See generally* William H. Baker et al., *Critical Factors for Enhancing Municipal Public Hearings*, 65 Pub. Admin. Rev. 490, 493 (2005). Local government meetings "typically are attended primarily, if not uniquely, by avid proponents and opponents of a measure affecting them personally...." Judith E. Innes & David E. Booher, *Reframing Public Participation Strategies for the 21st Century*, 5 Plan. Theory & Prac. 419, 424 (2004). Because the County Commissioners make important decisions directly affecting the citizens attending the meetings, "an invitation [to participate in prayer] from a government authority issued to the public often carries more weight and an expectation of compliance than other invitations" to pray—including invitations from invited guest chaplains. *Lund*, 2015 WL 2072345, at *14.

Citizens may understandably fear that refusing to participate in a prayer delivered by these government officials will make it harder to obtain favorable decisions or to influence the policy decisions about to

be made by those same government officials. The prayer instructions from the Commissioners come right after the Chairman calls the meeting to order; “few, if any, would consider [them] to be mere invitations which could be ignored.” *Id.* at *14. Because the Commissioners sit on a platform at the front of the meeting room, facing the public, they can easily see which of the audience members are standing (or not), assuming “a reverent position” (or not), or bowing their heads in prayer (or not).

Studies confirm what any reasonable citizen already knows: outing oneself as a religious dissenter by declining to participate in the Commissioners’ prayers risks incurring the Commissioners’ disfavor. Studies confirm that policymakers are more receptive to groups who adhere to their faith. See David Yamane, *Faith and Access: Personal Religiosity and Religious Group Advocacy in a State Legislature*, 38 *J. Sci. Study Religion* 543, 548–49 (1999). When an individual is perceived to be part of a minority or “outgroup,” members of the majority will be more inclined to suspect the individual’s motives. See Cecilia L. Ridgeway, *Conformity, Group-Oriented Motivation, and Status Attainment in Small Groups*, 41 *Soc. Psychol.* 175, 187 (1978). Outgroup

members are viewed even more suspiciously in public settings. Jeffrey G. Noel et al., *Peripheral Ingroup Membership Status and Public Negativity Towards Outgroups*, 68 J. Personality & Soc. Psychol. 127, 134–35 (1995).

Jackson County officials have compounded these pressures by disparaging those who object to the prayers. When Mr. Bormuth challenged the County’s practices, the Commissioners lambasted him:

- During a public meeting, one Commissioner characterized this case as “political correctness nonsense” and complained that he has “had political correctness jammed down [his] throat.” County of Jackson, *Personnel & Finance Committee November 12, 2013 Jackson County, MI*, YouTube (Dec. 19, 2013), <http://tinyurl.com/2013nov12> (43:00).
- That same Commissioner personally attacked Mr. Bormuth, remarking: “It’s taken some nitwit 200 and some years to come up with an angle like this to try to deprive me or other people of my faith, of my rights.” *Id.* (43:30).
- Another Commissioner declared that the lawsuit was not “just an attack on us, it’s an attack on Christianity, and it’s an attack on our Lord and Savior Jesus Christ.” *Id.* (33:28).
- When Mr. Bormuth spoke during a public-comment session to voice opposition to the County’s prayer practice, still another Commissioner rotated his chair to turn his back on Mr. Bormuth, refusing even to listen to those who object to the prayer practice. R. 10, Am. Comp. ¶31, PageID# 69.

In publicly reprimanding a citizen for seeking a more inclusive prayer practice, the Commissioners could not be clearer: citizens who refrain

from participating in the prayers will be met with the Commission's disfavor. In *Town of Greece*, “[i]n no instance did town leaders signal disfavor toward nonparticipants or suggest that their stature in the community was in any way diminished.” 134 S. Ct. at 1826. Here, the Commissioners turn their back—literally and figuratively—on those who decline to participate in the County's prayers.

Indeed, the two other federal courts applying *Town of Greece* to similar circumstances have recognized, even on less egregious facts, that practices like these unduly pressure citizens to participate in religious exercise. In *Lund*, the court deemed it “significant” that the instructions to stand for and join in the prayers were issued by “the Commissioners themselves.” 2015 WL 2072345, at *14. In *Hudson*, “[t]he fact that the Pittsylvania County Board compels public participation [through statements like ‘All rise if you can’] ... tends to create a coercive atmosphere.” 2015 WL 3447776 at *10. Both courts recognized what common sense confirms: for a citizen about to petition his government officials, instructions from those officials are difficult to ignore. Instructions from Jackson County Commissioners are harder

still to ignore, given what happens to those, like Mr. Bormuth, who decline to go along.

In concluding otherwise, the district court ignored the Supreme Court's instructions in *Town of Greece*. According to the district court, "the risk of prejudice is no greater if the request is delivered by a Commissioner than if it is delivered by a guest chaplain ... [because] Commissioners are equally capable of observing those who comply and those who do not." R. 61, Dist. Ct. Opinion, PageID# 1065. But the Supreme Court reached the opposite conclusion in *Town of Greece*: "Although board members themselves stood, bowed their heads, or made the sign of the cross during the prayer, *they at no point solicited similar gestures by the public.*" 134 S. Ct. at 1826 (emphasis added). In the Supreme Court's view, "[t]he analysis would be different if town board members directed the public to participate in the prayers...." *Id.* Because the Commissioners have the power to grant or deny citizens' requests for legislative action, the Commissioners' instructions carry far more weight than those of an invited guest.

The district court also incorrectly reasoned that, "as a practical matter," the public could opt out, come late, or temporarily leave the

room. R. 61, Dist. Ct. Opinion, PageID# 1064–65. Although the County has claimed, in filings before the district court, that the public is free to arrive late or leave during the prayer, R. 25, Def. Mot. for Summ. J., PageID# 254, nothing in the record indicates that “the attending public is ever made aware of such options, particularly when the public only hears phrases instructing everyone to stand and join in prayer, and not any statements indicating that public attendees need not do so.” *Lund*, 2015 WL 2072345, at *15. Far from showing that participation is optional, the Commissioners have made every effort to dictate participation and denounce those who dissent.

Finally, the district court overlooked the practical pressures applied by the Commissioners, suggesting that overt pressure is irrelevant unless specifically motivated by religious bias. The district court acknowledged that the Commissioners treated Mr. Bormuth disrespectfully after he objected to the prayers, yet the court assumed that their behavior resulted not from “prejudice” but from “their own personal sense of affront elicited by his sentiments.” R. 61, Dist. Ct. Opinion, PageID# 1065. That is a distinction without a difference.

Disparagement by government officials serving in their official capacities at official meetings produces significant pressure on citizens to conform—whether that disparagement arises from religious bias or authoritarian pique. In either case, a citizen has two options: (1) participate in a prayer that violates her conscience, or (2) risk the Commissioners’ wrath—whatever might be motivating it. The Establishment Clause prohibits Jackson County from putting citizens to that choice.

Conclusion

The judgment of the district court should be reversed and summary judgment should be entered in favor of Mr. Bormuth.

Respectfully submitted,

/s/ Gregory M. Lipper
Richard B. Katskee (katskee@au.org)
Gregory M. Lipper (lipper@au.org)
AMERICANS UNITED FOR SEPARATION
OF CHURCH AND STATE
1901 L Street, NW, Suite 400
Washington, DC 20036
(202) 466-3234

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Certificate of Compliance

This brief was prepared in Microsoft Word, Century Schoolbook, 14-point font. According to the word-count function and in accordance with the computation rules set forth in Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), the brief contains 5,725 words.

/s/ Gregory M. Lipper
Gregory M. Lipper

Certificate of Service

On September 16, 2015, I electronically filed this *amicus* brief on through the Court's ECF system.

Additionally, under 6 Cir. R. 25(f)(1)(B), I served Appellant Peter Bormuth by U.S. Mail, in accordance with Federal Rule of Appellate Procedure 25(c)(1)(B) and 6th Circuit Rule 25(f)(1)(B).

/s/ Gregory M. Lipper
Gregory M. Lipper

Designation of Relevant District Court Documents

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